Doral Building Services, Inc. *and* Stove, Furnace and Allied Appliance Workers International Union of North America, AFL–CIO, Local No. 125B. Case 31–CA–10100

4 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 3 December 1982 Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Doral Building Services, Inc., Los Angeles and Pasadena, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

DECISION

ROGER B. HOLMES, Administrative Law Judge: In order to understand more easily the present status of this proceeding, it may be helpful to review briefly some of the matters which have occurred earlier in this case and in the underlying representation case.

I. PRELIMINARY MATTERS

Based upon a representation petition in Case 31–RC–4626, which was filed on October 11, 1979, by Stove, Furnace and Allied Appliance Workers International Union of North America, AFL–CIO, Local No. 125B, the Board conducted an election on January 3, 1980, among certain building maintenance employees of Doral Building Services, Inc. The description of the unit in which that election was held is:

> All building maintenance employees employed by the Employer at the following locations: in Pasadena, California: 100 West Walnut Street, 75 North Fair Oaks Street, 170 North Fair Oaks Street, and 80 South Lake Street; in Los Angeles, California: 714 West Olympic Boulevard, 1052 West 6th Street, 201 South Alvarado Street, and 133 South Lasky Drive; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The numerical count at the election was that 25 votes were cast for the Union and 23 votes were cast against union representation. There were two challenged ballots, which were sufficient in number to affect the results of the election.

The Employer timely filed an objection to conduct affecting the results of the election. The Employer's objection is as follows:

> Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, the Employer hereby objects to conduct of the Petitioner, through its agents and representatives, affecting the results of the election conducted on January 3, 1980, all as described below.
>
> Immediately prior to and during the time the polls were open on the day of the election, agents and representatives of the Petitioner offered monetary payments to certain employees in order to and for the purpose of inducing them to vote in favor of representation by the Petitioner.
>
> The above-described acts of conduct interfered with the free and untrammeled choice of the employees voting in the election and, therefore, the election should be set aside.

Following an administrative investigation, the Regional Director for Region 31 of the Board in Los Angeles issued on February 28, 1980, a Supplemental Decision and Certification of Representative. He found that the Employer's objection to the election was without merit. He also sustained the challenge to one of the two challenged ballots. Thus, it became unnecessary to resolve the issues with regard to the one remaining challenged ballot because that one ballot could not have an effect upon the results of the election. The Employer filed a request for review of the Regional Director's decision with the Board in Washington, D.C. On April 8, 1980, the Board denied the Employer's request for review.

By letters dated April 30 and May 27, 1980, and by a telephone conversation on June 9, 1980, the Union made requests that the Employer bargain with the Union. The Employer did not reply to the letters, but the Employer's attorney advised the Union's attorney in their telephone conversation that the Employer was unwilling to bargain with the Union based upon the Employer's contention that its objection to the election should have been

sustained and that the Board's certification was improper.

The unfair labor practice charge in Case 31–CA–10100 was filed on June 13, 1980, by the Union. The Regional Director for Region 31 of the Board, who was acting on behalf of the General Counsel of the Board, issued on July 22, 1980, a complaint alleging that the Employer had refused to bargain with the Union in the unit referred to above in violation of Section 8(a)(1) and (5) of the Act. The Employer filed an answer to the General Counsel's complaint on July 30, 1980. Counsel for the General Counsel then filed on August 27, 1980, with the Board in Washington, D.C., a Motion for Summary Judgment.

The Board issued on September 30, 1980, its Decision and Order in this case. The decision is published at 252 NLRB 1243. Thereafter, the Board filed an application for enforcement of the Board's Order in the United States Court of Appeals for the Ninth Circuit. However, the Board, on its own motion, decided that it should reconsider its decision, and, therefore, the Board filed with the court a motion to withdraw its application for enforcement and the record before the court. The court granted the Board's motion.

On February 24, 1982, the Board issued an Order Rescinding Decision and Remanding Proceeding to Regional Director for Hearing. In that Order, the Board directed that a hearing be held before an administrative law judge "for the purpose of receiving evidence to resolve issues raised by Respondent's objection."

Pursuant to the Board's Order dated February 24, 1982, a hearing was held before me on October 14, 1982, at Los Angeles, California. The time for filing post-hearing briefs was set for November 18, 1982.

II. JURISDICTION AND LABOR ORGANIZATION

The jurisdiction of the Board over the business operations of the Employer is not in issue in this proceeding. The Employer is engaged in the business of providing janitorial services to commercial enterprises. The Employer has its principal office located in Los Angeles, California. The Employer's business operations meet the Board's indirect outflow jurisdictional standard.

The status of the Union as being a labor organization within the meaning of the Act also is not in dispute in this proceeding. That fact was admitted in the pleadings.

III. THE WITNESSES AND CREDIBILITY RESOLUTIONS

Five persons were called to testify as witnesses at the hearing in this proceeding. In alphabetical order by their last names, they are: Richard J. Bacher, who is the third vice president of Stove, Furnace and Allied Appliance Workers International Union of North America, AFL–CIO; Oscar Castaneda, who is a former employee of Doral Building Services, Inc., and who was terminated from employment by the Company; Andrew B. Kaplan, who is an attorney in the law firm of Pettit & Martin, and who represents the Employer in this proceeding; Alexander Mendoza, who has been an employee of the Company since November 1, 1978; and Marcela Ramirez, who was formerly employed by the Company during the time material herein.

The findings of fact to be set forth herein will be based upon portions of the testimony of each one of the five witnesses, documentary evidence which was introduced by the parties at the trial, stipulations which the parties entered into, and certain facts which are not in dispute.

In addition, some of the findings of fact will be based upon the written statements and the affidavits of two persons who were "unavailable," as I construe that term as used in Rule 804 of the Federal Rules of Evidence. The names of the two persons are Catarino Lopez and Fermin Lozoya. They were formerly employed by the Company at the time of the election in issue herein.

Catarino Lopez was killed in a traffic accident near Bakersfield, California, in August 1982. (See Tr. pp. 129–130.) The whereabouts of Fermin Lozoya were unknown to the Employer at the time of the hearing. (See Tr. pp. 151–152.) In an effort to locate Lozoya, the Employer obtained the services of Windsor Security, which is a private investigation agency. Agents of Windsor Security obtained two addresses for Lozoya from the Los Angeles Police Department, and they visited both locations on several occasions to try to locate Lozoya. The agents were told that Lozoya was not living at those addresses, that the persons there had never heard of him, and that they did not know where he was. The agents also checked with the postal inspector's office for a mailing address for Lozoya, and they checked with the voter registration office and the Department of Motor Vehicles. They further checked with various utility companies in California to ascertain if any of those companies had an address for Lozoya. All of the agents' efforts were unsuccessful in locating Lozoya.

Lopez and Lozoya were among the individuals who had given written statements in the Spanish language on January 22, 1980, to the Company's attorneys. Attorney Diane Bartoli, who at that time was an associate in the law firm of Pettit & Martin, and who is bilingual in the English language and the Spanish language, assisted attorney Kaplan in taking the statements from the employees. The statements were read to the employees in the Spanish language, and the employees signed the statements at that time. (See Tr. pp. 89–90 and 140–142.)

Introduced into evidence as Respondent's Exhibit 6 was a copy of a letter dated October 6, 1982, from attorney Kaplan to attorney Richard Paradise, who served as counsel for the General Counsel in this proceeding. A copy of that letter was sent to attorney Michael J. Shelley of the law firm of Potts & Richman, who represents the Union in this proceeding. In part, the letter stated:

> This is to confirm our telephone conversations of September 15, October 4 and 5, 1982 wherein I advised that it was the employer's intent to move into evidence, at hearing in the above-referenced matter, the written statements of Catarino Lopez and Fermin Lozoya previously supplied to your office in connection with Case No. 31–RC–4626. This, pursuant to Rules 803(24) and 804(b)(5) of the Federal Rules of Evidence, in that Mr. Lopez is dead

and the employer, despite its best efforts, has been unable to locate Mr. Lozoya.

As you are aware, the statements aver that while waiting to vote in Case No. 31-RC-4626, and some five or ten minutes before the polls opened, Messrs. Lopez and Lozoya were approached by Guillermo Gonzalez and offered twenty dollars if they would vote in favor of the union.

Under the provisions of Rule 804(b)(5) of the Federal Rules of Evidence, I received into evidence, over timely objections, both the written statements given by Lopez and Lozoya to the company attorneys on January 22, 1980, and the affidavits given by Lopez and Lozoya to an agent of Region 31 of the Board on January 23, 1980. Respondent's Exhibit 8 is the Spanish language statement given by Lopez to the company attorneys, and Respondent's Exhibit 9 is the English language translation of that statement. Respondent's Exhibit 10 is the Spanish language affidavit given by Lopez to a Board agent, and Respondent's Exhibit 11 is an English language translation of that affidavit. Respondent's Exhibit 7 is the Spanish language statement given by Lozoya to the company attorneys, and Respondent's Exhibit 12 is an English language translation of that statement. Respondent's Exhibit 13 is the Spanish language affidavit given by Lozoya to a Board agent, and Respondent's Exhibit 14 is an English language translation of that affidavit.

It is stated in 5 Wigmore *Evidence* §1367 (Chadbourn rev. 1974), with regard to the importance of cross-examination, "Nevertheless, it is beyond any doubt the greatest legal engine ever invented for the discovery of truth." Of course, there was no opportunity at this hearing for anyone to cross-examine Lopez and Lozoya. However, in *Central Freight Lines*, 250 NLRB 435 (1980), which was an earlier unfair labor practice case before me, I received into evidence the affidavit of a deceased person under my view of Rule 804(b)(5) of the Federal Rules of Evidence. The Board stated in footnote 1 in that decision: "We agree with the Administrative Law Judge that the affidavit is admissible with regard to the conversation between Barthell and Domino, as it meets the standards of Rule 804(b)(5)." In this connection, see also the Board's decision in *Prestige Bedding Co.*, 212 NLRB 690 at 701, fn. 13 (1974).

As I pointed out to the parties in this case during the hearing, the United States Court of Appeals for the Fifth Circuit did not agree with the ruling which I had made during the trial in *Central Freight Lines* with regard to the Barthell affidavit. See the court's opinion in *Central Freight Lines v. NLRB*, 653 F.2d 1023 (5th Cir. 1981). At 1026, the court held:

> In admitting the affidavit, the ALJ relied on Fed.R.Evid. 804(b)(5), the residual exception to the hearsay rule. For that Rule to apply, however, an extra-judicial statement must have circumstantial guarantees of trustworthiness equivalent to those listed in the Rule at 804(b)(1)-(4): former testimony, belief of impending death, statement against interest, and personal or family history.
>
> There is no evidence that Barthell had a belief in impending death. Nor is there evidence that the Barthell affidavit had any equivalent guaranty of trustworthiness of any kind. Indeed, it was written by examiner Brown and merely signed by Barthell. As stated in *Workman v. Cleveland-Cliffs Iron Co.*, 68 F.R.D. 562, 565 (N.D.Ohio 1975): "The Court is well aware of the subtle shifts in meaning that can occur when one's statement is recorded by another."
>
> Unless application of Rule 804(b)(5) be limited to circumstances evidencing a clear basis of trustworthiness, exceptions to the rule against hearsay could swallow the rule. Because there were no such circumstances here, the board erred as a matter of law in relying on the Barthell affidavit to support a finding that the Company violated Section 8(a)(1) because of a Domino-Barthell conversation. Paragraph 1(b) of the board's order depends entirely, and paragraph 1(c) thereof depends in part, on the Barthell affidavit. The former must therefore be deleted and the latter amended.

Nevertheless, the Board has made it clear that its administrative law judges are obligated to apply Board precedent, unless such precedent is later reversed by the Board itself or by the United States Supreme Court. *Ford Motor Co.*, 230 NLRB 716 (1977), enfd. 571 F.2d 993 (7th Cir. 1978), affd. 441 U.S. 488 (1979). (See also my discussion regarding the obligation to follow Board precedent in an earlier case before me, where I applied the Board's holding in *Alleluia Cushion Co.*, 221 NLRB 999 (1975), although the United States Court of Appeals for the Ninth Circuit had indicated recently at that time its disagreement with the *Alleluia Cushion* theory in a still earlier case before me. *Hotel & Restaurant Employees Local 28*, 252 NLRB 1124, 1133-34 (1980). The case which had preceded that one was *Bighorn Beverage*, 236 NLRB 736 (1978), and the court's opinion is reported in *NLRB v. Bighorn Beverage*, 614 F.2d 1238 (9th Cir. 1980).)

An additional consideration in this proceeding for receipt of the written statements and the affidavits of Lopez and Lozoya is the fact that this hearing was more like an investigatory hearing on objections to an election than the usual adversary unfair labor practice trial. (See the facts set forth in sec. I herein with regard to the present status of this proceeding.) It seems to me that there is more reason here to avoid being overly technical in applying the Federal Rules of Evidence "so far as practicable" in light of the nature of this hearing. (See Sec. 10(b) of the Act.) However, I do not mean to imply that all of the assertions made in the statements and affidavits are to be viewed uncritically and without consideration of the other evidence.

Ramirez appeared as a witness at the hearing, as indicated above, but she did not relate on the witness stand her account of the events to be described in section A and section B herein. (See Tr. pp. 23-87.) However, she had given a written statement to the company attorneys, and she read it over and stated that it was true and correct when she made it. She, at first, denied that she had

signed any other statements with regard to this matter, and she did not recall giving an affidavit to a Board agent. (See Tr. pp. 63–64 and 72–73.) However, she did recognize her signature on an affidavit which was produced from the Region's files. She also indicated that she did not remember voting in the election in issue herein, but the *Excelsior* list indicated that she had, in fact, voted. (See Tr. pp. 84–87.) Under the circumstances, I received into evidence both her written statement which she had given to the company attorneys and the affidavit which she had given to a Board agent. Those exhibits are Respondent's Exhibit 4 and Union's Exhibit 1. Respondent's Exhibit 5 is an English language translation of Respondent's Exhibit 4, and Union's Exhibit 2 is an English language translation of Union's Exhibit 1. See the Board's decision in *Alvin J. Bart & Co.*, 236 NLRB 242 (1978), and the Board's decision in *Economy Fire & Casualty Co.*, 264 NLRB 16, fn. 1 (1982).

When Mendoza was asked if he had ever given a statement to the National Labor Relations Board, Mendoza replied "never." (See Tr. pp. 102.) Then he was shown an affidavit, which Mendoza acknowledged as being his statement. (See Tr. pp. 104.) At the hearing, Mendoza testified that he had heard Gonzalez talk to other employees about the Union "a few days before and a few days after" the election. (See Tr. pp. 106–109.) However, in the English language translation of his earlier affidavit, which he had given to a Board agent on January 23, 1980, Mendoza had stated, "I have heard other employees say that Gonzalez was in favor of the union, but I never heard him talk about the union before the day of the election as I mentioned above." Mendoza acknowledged at the hearing that he and Gonzalez did not get along with each other, and that they did not like one another. Mendoza testified, "Because he was for the union and I wasn't . . . . No, just because of the union, just because of that." (See Tr. pp. 104–106.) In these circumstances, I received into evidence as Union's Exhibit 3 the Spanish language affidavit which Mendoza had given to a Board agent, and also I received as Union's Exhibit 4 an English language translation of that affidavit. (See the cases cited above with regard to Ramirez.) Bearing in mind the foregoing matters, and bearing in mind the passage of time between the date of the election and the date of the hearing, I found the affidavit to be a more reliable account of his version of the events than Mendoza's recollection at the hearing.

With regard to all of the witnesses, I have given consideration to their demeanor while they were testifying, their occupations and positions with one of the parties to the proceeding, and whether their accounts are consistent with, or inconsistent with, the accounts of other persons, documentary evidence, and facts which are not in dispute.

A. *Matters Pertaining to Guillermo Gonzalez*

At the time of the election on January 3, 1980, Guillermo Gonzalez was between 19 and 20 years old, and he had been employed by the Company for about 10 months.

Oscar Castaneda was formerly a roommate of Gonzalez for about 8 or 9 months, including the time of the election. Castaneda also was employed by the Employer at the time of the election, and he performed the task of cleaning restrooms. At the time of the hearing, Castaneda had no idea of the whereabouts of Gonzalez. Castaneda had last seen Gonzalez at a discotheque about 2 months prior to the hearing.

In the opinion of Castaneda, Gonzalez was "just playing around all the time." Castaneda formed the belief that Gonzalez sometimes said things in order to make other people laugh. In Castaneda's opinion, the reputation of Gonzalez among the other employees was that Gonzalez was "playful and to a certain extent irresponsible . . . nobody believed what he said because he always said things with a double meaning." Castaneda recalled talking with "almost all" of the employees with regard to Gonzalez. However, he did not recall their names at the time of the hearing except for Lopez and Lozoya, about whom he related his conversations. (See Tr. pp. 183–185.)

According to the English language translation of the affidavit which Lozoya had given to a Board agent, Lozoya was of the opinion regarding Gonzalez on the day of the election: "I did not believe that he was going to give money because I know him pretty well and he is always joking and playing around." (See Resp. Exhs. 13 and 14.)

According to the English language translation of the statement which Lopez had given to the company attorneys, Lopez said that Gonzalez had spoken in favor of the Union before the election. (See Resp. Exhs. 8 and 9.) According to the English language translation of the affidavit which Lopez had given to a Board agent, Lopez also stated, "I heard Guillermo talk about the Union several times before the day of the election, he always talked in favor of the Union. He once invited me to go to a Union meeting but I didn't go." (See Resp. Exhs. 10 and 11.)

According to the English language translation of the affidavit which Ramirez had given to a Board agent, Ramirez stated regarding Gonzalez, "Guillermo always spoke like he was joking. I did not believe that he was going to give the 20 dollars. I never know when Guillermo is joking or serious." (See U. Exhs. 1 and 2.)

International Union Vice President Bacher and union representative Ruben Diaz were the two union representatives who participated in the Union's efforts to organize the employees of the Employer. According to Bacher, Guillermo Gonzalez did not assist the Union in the organizing of employees. Gonzalez was not employed by either the International Union or the Local Union, and Gonzalez was not an official of either organization.

Bacher was present at the Ralph M. Parsons Building located at 100 West Walnut immediately prior to the start of the election held at that location on January 3, 1980. According to Bacher, individuals volunteered to be election observers for the Union. Either Bacher or Diaz selected the individuals to be union observers from among those who volunteered. Bacher recalled that he had talked with Gonzalez on that occasion. Introduced into evidence as Respondent's Exhibit 3 was a copy of the Certification on Conduct of Election. What purports

to be the signature of Guillermo Gonzalez appears thereon as an election observer for the Union. (See Tr. pp. 33–36.)

At the hearing, Bacher said that he had no knowledge that Gonzalez had offered money to anyone for purposes of voting for the Union. Bacher did not authorize Gonzalez to make any such statement, and Gonzalez did not tell Bacher that Gonzalez had done so. Bacher did not offer to give Gonzalez any money so that Gonzalez could pay anyone, and Bacher did not authorize anyone else to do so. Bacher said at the hearing that he had never authorized anyone to do so in any election. According to Bacher, neither the International Union nor the Local Union had paid any money to Gonzalez, and he said the LM 3 report required by the Labor Management Reporting and Disclosure Act did not reflect any monetary payments by the Union to Gonzalez.

B. *The Events on January 3, 1980*

The election involved herein was held in the Parsons Building in Pasadena in a room which was nornally used by the Employer to store cleaning supplies. Before the election began, four or five employees were waiting in another room.

In the English language translation of the affidavit which Ramirez had given to a Board agent, Ramirez stated:

> Guillermo Gonzalez, a cleaning employee, like me, said in a loud and kind of merry voice "I will give 20 dollars to whoever votes for the union." He put his hands in his pockets but I did not see him take money out. I did not answer him, nor did any of the others answer him. Guillermo always spoke like he was joking. I did not believe that he was going to give the 20 dollars. I never know when Guillermo is joking or serious.

In the English language translation of the affidavit which Mendoza had given to a Board agent, Mendoza stated:

> At about five to 11:00, I heard Guillermo Gonzalez tell a group of about five employees in a not very loud voice, "If you vote yes, I will give you 20 dollars." Upon hearing this I left that area and went to the voting area to vote. I did not hear anyone answer Gonzalez. Of those in the group he said it to, I only know Marcela and Cheni I heard Gonzalez make his offer in a serious voice, but I do not know if he made it in jest or truthfully.

In the English language translation of the statement which Lopez had given to the company attorneys, Lopez stated:

> At about 10:55 p.m. on January 3, 1980, Guillermo Gonzalez told a group of employees, from four to five people, that if they voted for the union he would give them twenty (20) dollars each. I heard what Guillermo offered the group of employees.

In the English language translation of the affidavit which Lopez had given to a Board agent, Lopez stated:

> An employee named Guillermo , I don't know his last name, told the group in general in a loud voice "I offer $20 to the ones who vote for the Union even though I will spend my whole salary, but the vote has to be signed." Guillermo said this seriously. I believe what he said about giving the money, but I didn't talk to him because I went in to vote.

In the English language translation of the statement which Lozoya had given to the company attorneys, Lozoya stated: "This occurred while I was in line to enter the room where the election was held."

In the English language translation of the affidavit which Lozoya had given to a Board agent, Lozoya stated:

> . . . and he said to the group laughing and playing around "I offer 20 dollars to whoever votes for the union." I did not believe that he was going to give money because I know him pretty well and he is always joking and playing around. Besides, I know that he doesn't have any money because he told me so and also he said that he had spent all of the money he had moving to an apartment. When Guillermo spoke of the 20 dollars, no one said anything to him in reply.

Conclusions

In analyzing the evidence presented in this case, it is helpful to look for guidance to the Board's decision in *Teamsters Local 886 (Lee Way Motor Freight)*, 229 NLRB 832 (1977), where the Board stated at 832–833:

> We note, however, that Section 2(13) of the Act provides that:
>
> > In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
>
> Rather, responsibility attaches if, applying the "ordinary law of agency," it is made to appear the union agent was acting in his capacity as such. *Local 760, International Brotherhood of Electrical Workers, A.F. of L. (Roane-Anderson Company)*, 82 NLRB 696, 712 (1949). And, as the Board has indicated in *International Longshoremen's and Warehousemen's Union, C.I.O., Local 6, et al. (Sunset Line and Twine Company)*:
>
> > A principal may be responsible for the act of his agent within the scope of the agent's general authority, or the "scope of his employment" if the agent is a servant, even though the principal has not specifically forbidden the act in question. It is enough if the principal actually empowered the

agent to represent him in the general area within which the agent acted.[1]

As the Second Circuit in *N.L.R.B.* v. *Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO [New York Telephone Company]*,[2] noted, "[c]ommon law rules of agency govern; authority may be implied or apparent, as well as express."

[1] 79 NLRB 1487, 1509 (1948).
[2] 467 F.2d 1158 (1972).

Applying the foregoing legal principles to the particular facts in this case, I conclude that Gonzalez was not an agent of the Union at the time material herein, and that Gonzalez' conduct just prior to the election is not attributable to the Union. In this connection, I have considered the fact that Gonzalez had spoken to employees in favor of the Union on earlier occasions. Of course, as an employee of the Employer, Gonzalez had a right to do so, and that right is protected by the Act. According to Bacher, Gonzalez did not assist the Union in its organizing efforts among the employees of the Employer. Thus, insofar as the record shows, Gonzalez had no particular prominence or role in the Union's organizing campaign, other than to speak to employees in favor of the Union and to act as an election observer for the Union. As an election observer, I conclude that Gonzalez was limited to the usual duties of an election observer in a Board-conducted election. I find no basis for inferring otherwise. Bacher did not authorize Gonzalez to offer $20 to employees if they voted for the Union. Gonzalez was not paid any money by the Union, and Gonzalez did not hold any position with the Union. Thus, as indicated above, I conclude that Gonzalez was not acting as an agent of the Union in making the $20 offer to the employees, and that his conduct is not attributable to the Union. In addition to the cases cited above, see also *J-Wood*, 263 NLRB 1179 (1982), and *Firestone Steel Products Co.*, 235 NLRB 548 (1978), and the cases cited therein.

Nevertheless, while the Board has accorded less weight to conduct which is not attributable to a party to an election, the Board has set aside elections where the conduct by nonparties "created a general atmosphere among the voting employees of confusion and fear of reprisal for failing to vote for or to support the Union." *Steak House Meat Co.*, 206 NLRB 28, 29 (1973). Therefore, I turn now to an analysis of Gonzalez' conduct on the day in question.

After considering the various accounts related in section A and section B herein, I conclude that the evidence presented at the hearing shows that about 5 to 10 minutes prior to the election held on January 3, 1980, Gonzalez told a group of four to five employees, who were located in a room other than the room where the election was to be held, that he would give $20 to anyone who voted for the Union. I further conclude that Gonzalez made his offer to the employees in a joking manner. That conclusion rests upon: (1) Lozoya's observation that Gonzalez "said to the group laughing and playing around 'I offer 20 dollars to whoever votes for the union'"; (2) Ramirez' observation that Gonzalez spoke in a "kind of merry voice"; and (3) the observations and descriptions of Gonzalez given by the employees, as related in section A herein, which indicate that Gonzalez had demonstrated a trait or characteristic to them of being a person who frequently jokes with them.

In connection with item (3) above, note the descriptions that the other employees gave regarding Gonzalez: (1) he was "just playing around all the time"; (2) he was "playful and to a certain extent irresponsible . . . nobody believed what he said because he always said things with a double meaning"; (3) "I know him pretty well and he is always joking and playing around"; and (4) "Guillermo always spoke like he was joking . . . I never know when Guillermo is joking or serious." Thus, I conclude that the evidence set forth in section A herein shows a propensity on the part of Gonzalez to act in a joking manner, and that his trait or characteristic in that regard makes it more probable that Gonzalez did make his offer of $20 to the employees in a joking manner, which was observable to those hearing him. Therefore, I further conclude that the foregoing outweighs the observations of Mendoza and Lopez that Gonzalez spoke seriously to the group. In addition, Lopez is the only one who related that Gonzalez told the group that they had to sign their ballots in order to receive $20. Note that Lopez related that in his affidavit which he had given to a Board agent, but he did not relate that in his written statement which he gave to the company attorneys. I conclude that the weight of the evidence is against Lopez' assertion in that respect because no other person gave that version in his account.

In summary, I have concluded at this point that the offer was made: (1) in a joking manner; (2) by an employee who was not an agent of the Union; and (3) in a room other than the one in which the election was held. However, those conclusions do not end the inquiry because another basis urged in support of the Employer's objection to the election is that Gonzalez' remarks violated the rule announced by the Board in its decision in *Milchem, Inc.*, 170 NLRB 362 (1968).

For guidance in applying the *Milchem* rule, I have looked to the Board's recent analysis and explanation of the *Milchem* rule. In its decision in *Boston Insulated Wire & Cable Co.*, 259 NLRB 1118 (1982), the Board stated:

> Nevertheless, the Board does not apply its "no electioneering" rules to set aside elections whenever electioneering takes place "at or near the polls," regardless of the circumstances. While the Board seeks to establish election conditions as ideal as possible, "elections must be appraised realistically and practically, and should not be judged against theoretically ideal, but nevertheless artificial, standards."[7] A representation election is often the climax of an emotional, hard-fought campaign and it is unrealistic to expect parties or employees to refrain totally from any and all types of electioneering in the vicinity of the polls.[8]
>
> When faced with evidence of impermissible electioneering, the Board determines whether the conduct, under the circumstances, "is sufficient to war-

rant an inference that it interfered with the free choice of the voters."[9] This determination involves a number of factors. The Board considers not only whether the conduct occurred within or near the polling place, but also the extent and nature of the alleged electioneering,[10] and whether it is conducted by a party to the election or by employees.[11] The Board has also relied on whether the electioneering is conducted within a designated "no electioneering" area[12] or contrary to the instructions of the Board agent.[13]

[7] *The Liberal Market, Inc.*, 108 NLRB 1481, 1482 (1954). While *Liberal Market* involved the effect of antecedent conduct upon a Board election, the standard is equally applicable to allegations of improper electioneering.

[8] Courts have recognized that the Board has "broad discretion in creating and enforcing standards to ensure fair elections." *Hall-Brooke Hospital* v. *N.L.R.B.*, 645 F.2d 158 (2d Cir. 1981). See also *N.L.R.B.* v. *Vista Hill Foundation*, 639 F.2d 479 (9th Cir. 1980); *N.L.R.B.* v. *Campbell Products Department*, 623 F.2d 876 (3d Cir. 1980).

[9] *Star Expansion Enterprises*, 170 NLRB 364, 365 (1968). Of course, conduct which violates the strict *Milchem* rule is found to constitute *per se* interference with the free choice of the voters.

[10] See *Cabs Housekeeper Service, Inc.*, 241 NLRB 1259 (1979). See also *Harold W. Moore d/b/a Harold W. Moore & Son*, 173 NLRB 1258 (1968). Even the Board's strict *Milchem* rule does not apply to any "chance, isolated, innocuous comment or inquiry" between a party to the election and a voter.

[11] In regulating the conduct of elections, the Board has long distinguished between the conduct of parties to the election and the conduct of employees. See, generally, *Orleans Manufacturing Co.*, 120 NLRB 630 (1958). Thus, the *Milchem* rule applies only to prolonged conversations between parties to the election and voters. See *N.L.R.B.* v. *Campbell Products Department, supra* and *N.L.R.B.* v. *Slagle Manufacturing Company*, sl. op. #80-1088 (10th Cir. 1981). This distinction has been applied to other types of electioneering as well. *Niagra Wires, Inc.*, 237 NLRB 1347 (1978). Third-party conduct must be "so disruptive" as to require setting aside the election. *Robert's Tours, Inc.*, 244 NLRB 818 (1979).

[12] *Marvil International Security Service*, 173 NLRB 1260 (1968); *Cabs Housekeeper Service, Inc., supra.*

[13] *Star Expansion Enterprises, supra.* The electioneering herein was not of such a nature or extent that it was brought to the attention of the Board agent.

With the foregoing holding by the Board in mind, I conclude that the statement made by Gonzalez, under the circumstances of this case, did not violate the Board's *Milchem* rule because: (1) the offer made by Gonzalez to the employees was made in a joking manner; (2) there was no prolonged conversation, but instead a brief statement; (3) Gonzalez was not an agent of the Union, and thus this was not a statement made by a party to the election; and (4) the statement was made 5 to 10 minutes prior to the start of the election and in a room which was not the polling area.

After considering all of the foregoing, I hereby recommend to the Board that the Employer's objection to the election held on January 3, 1980, in Case 31-RC-4626 be overruled. Accordingly, I further recommend to the Board that the Employer's refusal to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit be found in Case 31-CA-10100 to be an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Doral Building Services, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Stove, Furnace and Allied Appliance Workers International Union of North America, AFL-CIO, Local No. 125B, is a labor organization within the meaning of Section 2(5) of the Act.

3. All building maintenance employees employed by Respondent at the following locations: in Pasadena, California: 100 West Walnut Street, 75 North Fair Oaks Street, 170 North Fair Oaks Street, and 80 South Lake Street; in Los Angeles, California: 714 West Olympic Boulevard, 1052 West 6th Street, 201 South Alvarado Street, and 133 South Lasky Drive; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since February 28, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective-bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 30, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Since I have recommended to the Board that the Employer's objection to the election held on January 3, 1980, in Case 31-RC-4626 be overruled, and since I have recommended to the Board that the Employer's refusal to bargain with the Union be found in Case 31-CA-10100 to be an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act, I further recommend to the Board that the Board issue the same type of remedial order which the Board previously issued, but rescinded, in this case as reported in the Board volume as 252 NLRB 1243.

In order to ensure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, I recommend to the Board that the initial period of certification be construed as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropri-

ate unit. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Doral Building Services, Inc., Los Angeles and Pasadena, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Stove, Furnace and Allied Appliance Workers International Union of North America, AFL–CIO, Local No. 125B, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All building maintenance employees employed by Respondent at the following locations: in Pasadena, California: 100 West Walnut Street, 75 North Fair Oaks Street, 170 North Fair Oaks Street, and 80 South Lake Street; in Los Angeles, California: 714 West Olympic Boulevard, 1052 West 6th Street, 201 South Alvarado Street, and 133 South Lasky Drive; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at all its Los Angeles, California, and Pasadena, California, locations copies of the attached notice marked "Appendix."[1] Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 31, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

In fairness to all of the parties in this proceeding, their attention is called to the Board's Order Rescinding Decision and Remanding Proceeding to Regional Director for Hearing dated February 24, 1982, and the *10-day time limit* specified therein for the filing of any exceptions to this report with the Board in Washington, D.C. In part, the Board's Order provides:

> Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director for Region 31. If no exceptions are filed thereto, the Board will adopt the recommendation of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Stove, Furnace and Allied Applicance Workers International Union of North America, AFL–CIO, Local No. 125B, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All building maintenance employees employed by the Employer at the following locations: in Pasadena, California: 100 West Walnut Street, 75 North Fair Oaks Street, 170 North Fair Oaks Street, and 80 South Lake Street; in Los Angeles, California: 714 West Olympic Boulevard, 1052 West 6th Street, 201 South Alvarado Street, and 133 South Lasky Drive; excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

DORAL BUILDING SERVICES, INC.

[1] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."